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Via www.regulations.gov

Attn: Mary Jackson
Materials Recovery and Waste Management Division
Office of Resource Conservation and Recovery (5304P)
United States Environmental Protection Agency

Re: Comments on the Coal Combustion Residuals (CCR) State Permit Program Guidance Document (Interim Final) (82 Fed. Reg. 38685 (August 15, 2017)) Docket ID No. EPA-HQ-OLEM-2017-0458

To whom it may concern:

The Utility Solid Waste Activities Group ("USWAG")[1] submits these comments to the Environmental Protection Agency ("EPA" or the "Agency") on the Agency's Coal Combustion Residuals (CCR) State Permit Program Guidance Document (Interim Final), noticed in the Federal Register on August 15, 2017 (82 Fed. Reg. 38685) (the "Guidance"). USWAG members own and operate CCR disposal units subject to the requirements of the CCR regulations at 40 C.F.R. Part 257, Subpart D ("CCR rule"), or, if approved by EPA, the requirements of a state CCR permit program or other system of prior approval. Thus, many USWAG members have a direct interest in the states' development of and EPA's review and approval process for such programs.

As a general matter, USWAG strongly supports the issuance of guidance to facilitate the review and approval of state CCR permit programs.[2] Section 2301 of the Water Infrastructure Improvements for the Nation Act, 42 U.S.C. § 6945(d), (the "WIIN Act") does not require EPA to undertake a rulemaking, and a rulemaking is not necessary to implement the requirements of the WIIN Act. In fact, a rulemaking would needlessly delay implementation of the CCR rule through

[1] USWAG, formed in 1978, is an association of over one hundred and thirty electric utilities, power producers, utility operating companies, and utility service companies located throughout the United States, including the Edison Electric Institute ("EEI"), the American Public Power Association ("APPA"), and the National Rural Electric Cooperative Association ("NRECA"). Together, USWAG members represent more than 73% of the total electric generating capacity of the United States, and service more than 95% of the nation's consumers of electricity.

[2] USWAG uses the term "State CCR permit program" throughout these comments to refer to both State CCR permit programs and "other system[s] of prior approval and conditions." *See* 42 U.S.C. § 6945(d)(1)(A).

state permit programs and frustrate Congress' objective in passing the WIIN Act. Implementing the WIIN Act through the Guidance, on the other hand, will effectively assist states with developing their CCR permit programs and compiling the information and documentation EPA needs to determine that such programs meet the statutory requirements necessary to operate in lieu of the federal rule. Therefore, as discussed below, EPA should finalize the Guidance as soon as possible and immediately review and approve qualified state CCR permit programs under the WIIN Act.

The comments below are provided with the objectives of the WIIN Act in mind and highlight specific ways in which EPA can further improve the Guidance to ensure that the Act's ultimate objective—the regulation of CCR units through state CCR permit programs—is met as quickly as possible.

1. The Guidance Should Facilitate Prompt Review and Approval of State CCR Permit Programs.

A primary objective of the Guidance must be to allow for a quick and efficient process for states to apply for and receive approval from EPA for their state CCR permit programs to operate in lieu of the federal rule. The main impetus behind the WIIN Act was Congress' recognition that, under the existing CCR rule, utilities are faced with a host of unduly burdensome and problematic regulations that derive from a self-implementing regulatory regime reflecting risk assumptions and regulatory criteria based on the "lowest common denominator."[3] The WIIN Act also was Congress' reaction to the fact that the CCR rule could not be delegated to the states, but rather operated independent of and in addition to pre-existing state CCR controls, thus subjecting owners/operators of CCR units to dual and potentially inconsistent regulatory regimes, and clearly excessive costs. Congress recognized that these flaws with the existing regulatory regime could be addressed by implementing the rule through state CCR permit programs, and it specifically amended RCRA to allow for this.

Importantly, with certain of the most conservative and consequential elements of the self-implementing CCR rule quickly approaching—such as decisions relating to whether to close a CCR unit and/or how to implement corrective action under the rule's groundwater monitoring program—it is imperative that state CCR permit programs be approved to operate in lieu of the federal rule as quickly as possible so that the site-specific benefits of such programs can be realized. In fact, as EPA itself recognizes in the Guidance, one of the site-specific flexibilities that should be acceptable in a state CCR permit program is the determination that corrective action—otherwise required to be implemented under the CCR rule—might in fact *not* be necessary for

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[3] *See* 80 Fed. Reg. 21302, 21371 (Apr. 17, 2015) ("[T]he regulatory structure under which this rule is issued effectively limits the Agency's ability to develop the type of requirements that can be individually tailored to accommodate particular site conditions. Under [RCRA] sections 1008(a) and 4004(a), EPA must establish national criteria that will operate effectively in the absence of any guaranteed regulatory oversight (i.e., a permitting program), to achieve the statutory standard of "no reasonable probability of adverse effects on health or the environment" at all sites subject to the standards.").

certain CCR units.[4] But because the CCR rule's "one-size-fits all" corrective action obligations are rapidly approaching under the federal self-implementing rule, it is absolutely critical that state CCR permit programs be put in place as soon as possible. Otherwise, utilities could be compelled to incur exorbitant costs and undertake irreversible operating decisions under the self-implementing rule that otherwise would not be required under an approved state CCR permit program. For example, a state CCR permit program might determine that a risk-based corrective action remedy is more cost-effective and in fact a better solution for protecting human health and the environment than the remedy prescribed by the CCR rule

Given this urgency, any actions that unnecessarily delay or obstruct the ability of states to administer CCR permit programs will frustrate the very purpose of the WIIN Act. As explained above, this is the exact reason EPA should *not* pursue a rulemaking (which is not required by law) to implement the Act. Similarly, an application and approval process that is too cumbersome or time-consuming will discourage states from developing and applying for approval of CCR state programs, and the benefits of the WIIN Act—and Congress' objective in enacting the law—will be lost. Equally important, an approval process that is unnecessarily cumbersome or time consuming for states that have *already* developed and submitted their state programs for approval (which some states have done) contradicts Congress' intent in enacting the WIIN Act. While the Guidance must allow EPA to appropriately review the adequacy of state CCR permit programs, it must not require information and/or procedures that are not necessary to achieve the statutory standard.

Given the above, USWAG supports aspects of the Guidance that further the prompt review and approval of state CCR permit programs. For example, USWAG believes that review of state CCR permit programs at the EPA Regional level, with concurrence from EPA Headquarters, is both appropriate and efficient.[5] EPA Regional offices are more likely to have familiarity with and a working knowledge of individual state regulatory programs and, therefore, are in the best position to review a state's application for approval. In this regard, EPA should ensure that the Regions manage the review and approval of state permit programs consistently and efficiently, while empowering the Regions to make decisions on the state applications. USWAG also strongly supports the Guidance's emphasis on early coordination between states and EPA when developing a CCR permit program.[6] This approach will allow a state to ensure that its program has been fully developed and its application is complete before it is submitted for review and approval, likely saving time during EPA's review of the application.

USWAG also supports EPA's use of a streamlined approach for review and approval of state CCR permit programs in cases where the CCR regulations are incorporated by reference, as

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[4] *See* Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, August 2017 (hereinafter "Interim Guidance") at 2-10.

[5] *See id.* at 1-2.

[6] *See id.* at 1-3.

well as cases where the state already has an approved municipal solid waste landfill (MSWLF) program in place.[7] In both of these scenarios, detailed information regarding the program either is not necessary or has already been previously developed by the state and submitted to EPA for review and approval. Particularly with regard to incorporation of the CCR regulations by reference, review and approval of the state program should be especially prompt and not require the full 180day review period, as EPA is statutorily *required* to approve such programs without any additional determinations.[8] In these circumstances, approval of the state CCR permit program is mandatory. Further, USWAG agrees that in this situation, a completed Part 257 checklist as set forth in Part 3 of the Guidance is unnecessary for review and approval. USWAG urges EPA to quickly approve any state programs already submitted for approval which have incorporated the CCR regulations by reference.

To further support a prompt and efficient review and approval process, the Guidance should provide clear timeframes for review once an application is submitted. For example, the 180-day time period EPA has to review a state application begins to run only after EPA determines that the application is complete,[9] but the Guidance does not provide any information regarding how much time EPA needs to make a "completeness" determination. Including a target date for making this completeness determination will help to ensure that it is made as promptly as possible. USWAG suggests that EPA adopt the approach in 40 C.F.R. Part 239 and make a completeness determination within 30 days from the date the application is submitted.[10][11] USWAG also emphasizes that EPA is statutorily required to review and approve/disapprove a complete state application within 180 days of submission (though determinations can and should be made more quickly in certain circumstances, such as where a state adopts the CCR rule by reference).[11] EPA does not have the authority to extend this review period beyond 180 days. This limitation is meant to ensure that the review of state applications does not extend indefinitely. To the extent that EPA determines more time is needed to approve a program because additional information from the state is needed to make an adequacy determination,[12] USWAG suggests that EPA provide a "conditional approval" subject to EPA receiving the necessary information.

As noted above, some states have already applied for program approval under the WIIN Act. This is consistent with EPA's statement in the Guidance that a state may submit an application even before the Guidance has been issued.[13] EPA should not hold up the review and approval of these state applications while the Guidance is finalized. For those state programs submissions that

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[7] *See id.* at 2-7.

[8] *See* 42 U.S.C. § 6945(d)(1)(B)(i).

[9] *See* Interim Guidance at 1-4.

[10] *See* 40 C.F.R. § 239.10(b).

[11] U.S.C. § 6945(d)(1)(B).

[12] *See* Interim Guidance at 2-6.

[13] *Id.* at 1-4.

are complete—including those that have incorporated the CCR rule by reference, which should automatically be deemed complete—the statutory 180-day review period has started and EPA approvals of qualified state CCR permit programs should be forthcoming promptly. EPA Headquarters should clearly communicate this position to the EPA Regions that currently are reviewing state CCR permit program applications.

2.[14] The Guidance Should Not Hinder a State's Ability to Incorporate Flexibility into its State CCR Permit Program.

Section 2301 of the WIIN Act explicitly allows state CCR permit programs to differ from the federal CCR rule, as long as the program is "as protective" as the federal rule. Specifically, the statute provides, in pertinent part, that:

> The Administrator *shall approve* . . . a state CCR permit program or other system of prior approval and conditions that allows a state to include technical standards for individual permits or conditions of approval *that differ from* the criteria under [the CCR rule] . . . if, based on site-specific conditions, the Administrator determines that the technical standards established pursuant to a state permit program or other system are at least as protective as the criteria under [the CCR rule].[14]

This statutory directive requires EPA to approve state CCR permit programs that, rather than mirroring the federal CCR rule, include individual permit conditions or conditions of approval that are different from, but nonetheless "as protective" as—given the consideration and evaluation of site-specific factors—the federal rule.

Whether a state permit condition is "as protective" as the CCR rule must be judged against the protectiveness standard established under RCRA Subtitle D (under which the CCR rule was promulgated). This means any permit condition or condition of approval must ensure "there is no reasonable probability of adverse effects on health or the environment from disposal" of CCR at the facility.[15] While in some cases this determination will involve a case-by-case evaluation of state permit program applications, in circumstances where the applicable state statute that is the basis of the state CCR permit program establishes an equivalent level of protection— *i.e.*, one that is comparable to the Subtitle D standard of ensuring no reasonable probability of adverse effects on health or the environment—EPA will be in a position to readily approve the state CCR program application. It is important that the Guidance reflect this point to reduce ambiguity regarding state CCR permit programs that, while different from the federal rule, are nonetheless "as protective" and thus warrant approval under the WIIN Act.

Moreover, as EPA acknowledges in the Guidance, there is no dispute that state CCR permit programs that incorporate certain provisions from EPA's Part 258 MSWLF regulations are "as

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[14] U.S.C. § 6945(d)(1)(C) (emphasis added).

[15] *See Id.* § 6944(a).

protective" as the CCR regulations.[16] This is because the standards under the Part 258 MSWLF regulations were promulgated under a statutory mandate that they be those "necessary to protect human health and the environment."[17] Thus, on their face, state CCR permit programs that incorporate the site-specific flexibilities contained in the MSWLF regulations meet the Subtitle D protectiveness standard and are "as protective" as the CCR rule. Indeed, EPA chose to exempt MSWLF landfills that receive CCR from the CCR regulations because such disposal is "as protective" as disposal in a regulated CCR unit.[1818] Thus, EPA itself has previously found the MSWLF regulations to be as protective as the CCR rule.

Given this, while USWAG fully agrees that the four elements of the Part 258 MSWLF standards listed in the Guidance on pages 2-9 and 2-10 clearly are "as protective" as the criteria in the CCR rule,[19] EPA should not limit the allowable flexibilities found in Part 258 to only those four specific items. Rather, if a state permit program regulates CCR units using the same standards found in Part 258, EPA already has the evidence it needs to find such programs "as protective" as the CCR rule. At the very least, EPA should also add the following specific provisions found in Part 258 as other examples of flexibilities that may be supported under a state CCR permit program: (1) allowing for, in determining the appropriate corrective action remedy, a consideration of technologies that are not currently available, but which may offer significant advantages over already available technologies in terms of effectiveness, reliability, safety, or ability to achieve remedial objectives (*see* 40 C.F.R. § 258.57(d)(4)); (2) allowing for alternative points of compliance for the groundwater monitoring system based on site-specific considerations (*see* 40 C.F.R. § 258.40(d)); and allowing for a decreased period of post-closure care where the reduced period is sufficient to protect human health and the environment (*see* 40 C.F.R. § 258.61(b)).

In addition, USWAG supports the Guidance's acknowledgement that states may seek additional flexibility beyond the provisions from the MSWLF program identified explicitly on pages 2-9 and 2-10.[20] The Guidance notes that the state would be responsible for providing evidence that any additional flexibility is "as least as protective" as the CCR regulations.[21] In making these evaluations, however, the Guidance should direct EPA to allow for deference to a

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[16] Interim Guidance at 2-9 – 2-10.

[17] *See* 42 U.S.C. § 6949a(c)(1).

[18] Fed. Reg. at 21341.

[19] These include the following: (1) allowing for suspension of groundwater monitoring requirements under §§ 257.91-257.95 if there is no potential for migration of hazardous constituents to the uppermost aquifer during the active life of the unit and post-closure care (referencing 40 C.F.R. § 258.50(b) in the MSWLF rules); (2) allowing the State Director to establish alternative groundwater protection standards for Appendix IV constituents without an MCL (as opposed to requiring the groundwater protection standard to be set at background) (referencing 40 C.F.R. § 258.56(i) and (j) in the MSWLF rules); (3) allowing the State Director to determine that remediation of a release of an Appendix IV constituent is not necessary under certain conditions; (referencing 40 C.F.R. § 258.57(e) in the MSWLF rules); and (4) allowing the State Director to specify an alternative length of time to demonstrate that remedies are complete (referencing 40 C.F.R. § 258.58(e)(2) in the MSWLF rules).

[20] *See* Interim Guidance at 2-10.

[21] *Id.*

state incorporating site-specific flexibility into individual permits that is commonplace in other state and federal permit programs (*e.g.*, MSWLF permit programs and Subtitle C hazardous waste permit programs), given that such flexibility is determined based on a state permit writer's professional judgement. The Guidance should not hinder the state's ability to incorporate such flexibility into its permit program, but, rather, should be focused on helping states to develop and submit only the information that is necessary for EPA to determine that its program is "at least as protective" as the federal CCR regulations. To facilitate the application process, USWAG suggests that EPA provide examples of types of information a state might provide in these situations. These examples would assist the states in developing their applications. The Guidance should also explicitly say that a state does not need to provide any additional evidence with regard to those flexibilities specifically identified as having adequate support in the Part 258 MSWLF regulations.[2223] Put simply, if a state CCR permit program contains elements of EPA's Part 258 programs for MSWLFs—including but not limited to, elements of that program that are incorporated into a CCR permit by a permit writer setting forth site-specific tailoring of applicable groundwater monitoring and corrective action requirements—EPA should deem those provisions of the state program "as protective as" the federal rule.

EPA should also deem state CCR permit programs "as protective as" the federal rule in circumstances where the state permit program authorizes a CCR unit otherwise required to close under the rule—*e.g.*, an unlined impoundment that exceeds a groundwater protect standard—to continue operating if the permit writer imposes conditions on the unit that ensures it can continue operating in a manner that is protective of human health and environment. Importantly, EPA specifically acknowledged in the CCR rule that such conditions could be imposed through facility specific permits, explaining that "that it may be possible at certain sites to engineer an alternative to closure of the unit that would adequately control the source of contamination and would *otherwise protect human health and the environment.*"[23] EPA declined to allow facilities to pursue this option in the final rule, however, explaining that "the efficacy of those engineering solutions will necessarily be determined by individual site conditions" and "[a]s previously discussed, the regulatory structure under which this rule is issued effectively limits the Agency's ability to develop the type of requirements that can be individually tailored to accommodate particular site conditions."[24]

However, now that the WIIN Act expressly allows for implementation of the CCR rule through enforceable state CCR permits that can be tailored to take into consideration individual site conditions, the reasoning for this blanket prohibition in approved state CCR permit programs under the WIIN Act does not exist. Therefore, EPA should approve state CCR permit programs that allow CCR units otherwise required to close under the federal rule to continue operating if the state, through individual permit conditions, establishes operating controls on the unit that

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[22] *See id.* at 2-9 – 2-10.

[23] Fed. Reg. at 21371 (emphasis added).

[24] *Id.*

adequately control the source of contamination and ensures the unit continues to operate in a manner protective of human health and the environment. Indeed, waste management units under other federal solid waste programs administered through EPA approved state programs are allowed to continue operating while undertaking corrective action (*see, e.g.*, MSWLF corrective action regulations at 40 C.F.R. §§ 258.56-.58).

Finally, USWAG believes that there is no need for an owner/operator-run CCR website once an approved state permit program is in place. Instead, a state should have the option of replacing the website requirement with normal state public information procedures. USWAG disagrees with EPA's statement in the Guidance that a state would have to post this information to a state-run website to meet the "as protective as" statutory standard.[25] The sole purpose of the website in the CCR rule, and the associated qualified professional engineer certifications, is to facilitate the self-implementing program. The CCR regulations, once implemented through a permit program, are no longer primarily enforced through citizen suits. Like all other regulatory programs, the public will have access to compliance information through the relevant state agency.

3. Other Comments on the Guidance

In addition to the comments above addressing elements of the Guidance that will facilitate (1) prompt review and approval of state CCR permit programs and (2) incorporation of flexibilities into state CCR permit programs, USWAG has the following comments on the Guidance:

- USWAG supports EPA's discussion in the Guidance on partial program approvals.[2627] The WIIN Act expressly recognizes that states can seek approval to implement the federal rule "in whole or *in part*."[27]

- The Guidance urges states to utilize the existing Part 239 regulations to develop a permit program application. While USWAG supports the use of Part 239 as general guidance in identifying the necessary elements of state program applications, USWAG discourages EPA from adhering to these requirements too rigidly. As noted above, the goal of the Guidance should be to ensure that the states provide enough information to allow EPA to review the program under the conditions of the WIIN Act, even if this information is not in the exact form required under Part 239.

- The WIIN Act does not require public participation in state CCR permit programs. While USWAG appreciates the role of public participation in state environmental programs, EPA should not substitute its judgment for that of the states in determining the type and appropriate degree of public participation in those programs or impose its own requirements on the states.[28]

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[25] *See* Interim Guidance at 2-10.

[26] *See id.* at 1-7 – 1-8.

[27] U.S.C. § 6945(d)(1)(B) (emphasis added).

[28] *See* Interim Guidance at 1-6, 2-3.

The statutory standard is whether the state program ensures that every CCR unit in the state complies with the criteria in the CCR rule or alternative criteria that are at least as protective as the federal criteria.

- USWAG supports EPA's determination that state beneficial use programs are not part of CCR permit programs and should not be part of the review and approval process.[29] CCR beneficial uses are exempt from the CCR regulations and are therefore appropriately excluded from state CCR permit program reviews.

- USWAG suggests that EPA allow a state Attorney General to delegate its certification responsibility to other appropriate state officials, who may be in a more appropriate position to certify that the relevant laws are enacted and fully in effect at the time the program is approved.[30] This will also help to avoid delay in the preparation and submission of state permit program applications.

- The Guidance misinterprets the WIIN Act as saying the Agency *cannot* implement a federal CCR permit program *without* specific Congressional appropriations to do so.[31] The WIIN Act states that EPA *must* issue CCR permits in non-participating states if Congress provides specific appropriations. But the statute does not preclude EPA from choosing to implement a federal CCR permit program as a policy decision, even in the absence of specific appropriations. Therefore, contrary to EPA's assertion in the Guidance, the Agency is not limited to implementing CCR permit programs in non-participating states in instances where it has not received specified appropriations for doing so.

- The Guidance states that EPA expects that a state application for program approval will include a completed Part 257 checklist (Chapter 3 of the Guidance).[32]Although a completed Part 257 checklist may be appropriate in some circumstances, states may find it easier and more appropriate to present this information to EPA in a different form. EPA should make clear that the completed Part 257 checklist is just a suggestion, and that states are free to determine the most suitable manner to provide information regarding the differences between the state CCR permit program and federal CCR rule. USWAG also suggests that EPA make the Part 257 checklist available in format that can be edited (*e.g.*, Word).

- USWAG notes that, although states typically adopt permit programs for managing various types of solid waste, several states employ "other systems of prior approval and conditions." For example, Texas has developed "registration" programs that create systems of prior approval and conditions for sewage sludge and municipal solid waste. And Kentucky has

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[29] *See id.* at 2-11.
[30] *See id.* at 1-2
[31] *See id.* at 1-9.
[32] *See id.* at 2-1.

recently adopted a system of prior approval and conditions for the regulation of CCRs through regulatory mechanisms referred to as "permit by rule" and "registered permit by rule." USWAG further notes that the WIIN Act does not define or otherwise describe what constitutes an "other system of prior approval and conditions," thereby providing EPA with considerable discretion in the determining the criteria for an approvable alternative system. For example, alternative systems could include mechanisms for evaluating individual impoundments on a case-by-case basis to develop site-specific conditions that are "at least as protective as" the CCR rule, or to apply criteria already found in state programs that the State has determined achieve this minimum federal level of protection for an individual impoundment.

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USWAG thanks EPA for the opportunity to comment on the Coal Combustion Residuals State Permit Program Guidance (Interim Final). Please contact me or USWAG counsel Doug Green (dhgreen@venable.com; 202-344-4483) or Maggie Fawal (mkfawal@venable.com; 202344-4791) at Venable LLP if you require further information or have questions about these comments.

Sincerely,

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